Attachment C

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPTARTMENT
Civil Action No.

02 983

MASSACHUSETTS ELECTRIC COMPANY,

Plaintiff,

v.

FIBERTECH NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC,

Defendant.

MEMORANDUM OF LAW OF MASSACHUSETTS ELECTRIC COMPANY IN SUPPORT OF ITS APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiff Massachusetts Electric Company ("MEC"), hereby submits its memorandum of law in support of its application for a preliminary injunction against the Defendant, Fibertech Networks, L.L.C., f/k/a Fiber Systems, L.L.C.'s ("Fibertech").

I. INTRODUCTION

This case is identical in all material respects to the consolidated actions brought against Fibertech by Verizon New England, Inc. ("Verizon) and Western Massachusetts Electric Company ("WMECO"), in which preliminary injunctions have already been granted.[1]

[1] In those consolidated actions, Verizon New England, Inc. v. Fibertech Networks, LLC, Civil Action No. 02-831 and Western Massachusetts Electric Company v. Fibertech Networks, LLC, Civil Action No. 02-843, Verizon and WMECO seek, among other things, to permanently enjoin Fibertech's unauthorized attachments to utility poles owned solely or jointly by Verizon and WMECO.

In this case, MEC and Fibertech are parties to an Aerial License Agreement (the "MEC Agreement") that establishes the terms and conditions under which MEC agreed to permit Fibertech to attach to poles solely owned by MEC, and jointly owned by MEC and Verizon. The MEC Agreement mandates, among other things, that Fibertech apply for a license, pay for and complete any necessary make-ready work, obtain the requisite local approvals, and adhere to any and all applicable safety standards before attaching to any MEC poles.

In or about late June, 2002, MEC discovered that Fibertech had intentionally failed and refused to comply with these requirements by surreptitiously installing more than 200 attachments to MEC's poles without a license, without paying for and completing make-ready work, without obtaining local approvals and without adhering to applicable safety and construction standards, thereby creating potentially life-threatening safety hazards for pole technicians and the public. Upon discovery of the unauthorized attachments and the potentially dangerous conditions created thereby, MEC promptly notified Fibertech that it must remedy these transgressions and that MEC would take appropriate action to enforce its rights, including termination of the MEC Agreement. Fibertech rebuffed MEC's demands for cure.

Like Verizon and WMECO in the consolidated actions, in this case MEC seeks a preliminary injunction enjoining Fibertech from making any further unauthorized attachments to MEC's poles, and requiring Fibertech to remove existing unauthorized attachments from more than 200 MEC-owned poles in Northampton, Massachusetts. While MEC and Verizon jointly own a number of poles in Northampton that are included within the scope of the preliminary injunctions already entered by this Court in the

consolidated actions, MEC solely owns a number of additional poles in Northampton that are not covered by the injunctions. Accordingly, MEC seeks injunctive relief enjoining Fibertech's unauthorized attachments to MEC's solely-owned poles in Northampton, as well as the express benefit of the Court's order covering the poles jointly owned by MEC and Verizon in Northampton.

II. FACTUAL BACKGROUND

MEC is a Massachusetts corporation, providing electric distribution services in Massachusetts. Fibertech is a Delaware limited liability company in the business of building and installing carrier-ready dark fiber optic networks for use by third-party telecommunications providers such as competitive local exchange carriers, long distance carriers, wireless carriers, and Internet service providers. Complaint at ¶ 2.

A. THE MEC AERIAL LICENSE AGREEMENT

On or about March 17, 2000, MEC entered into the MEC Agreement with Fibertech's predecessor, Fiber Systems, L.L.C., that established the terms and conditions under which MEC agreed to allow Fibertech to place and maintain "attachments"[2] on poles owned by MEC, either solely or jointly with Verizon, within the City of Worcester, in the Commonwealth of Massachusetts. Anundson Affidavit, Exh. A.

On or about July 22, 2000, MEC and Fibertech (then known as "Fiber Systems LLC") entered into an amendment to the MEC Agreement. This amendment added additional municipalities, including Northampton, Massachusetts, in which Fibertech

[2] The term "attachment" means "[a]ny single wire, cable or suspension strand , including wires or cables lashed to it, or any other hardware, cable, equipment, apparatus, or device, placed on [MEC's] pole. . ." Anundson Affidavit, Exh. A, Article 1.2.

could be permitted to place and maintain attachments on poles owned by MEC. Anundson Affidavit, Exh. B.

Pursuant to the MEC Agreement, Fibertech was obligated to apply for and have received a license from MEC and Verizon prior to placing any attachments. Anundson Affidavit, Exh. A, Article 7.1.

Before any license would be issued to Fibertech to attach to a particular pole, MEC could require the parties to perform a joint field survey to determine the adequacy of the pole to accommodate the proposed attachments and to determine what, if any, "make-ready work" was required to prepare the pole for the attachment and to provide the basis for estimating the cost of the work. Id., Article 8.1. Fibertech was required to place and maintain all proposed attachments in accordance with the requirements and specifications of the latest editions of the Manual of Construction Procedures ("Blue Book"), Electric Company Standards, the National Electrical Code ("NEC"), the National Electrical Safety Code ("NESC") and rules and regulations of the Occupational Safety and Health Act ("OSHA") or any governing authority having jurisdiction over the subject matter. Id., Article 5.1. If MEC determined, as a result of the joint field survey, that a pole to which Fibertech sought to attach was "inadequate or otherwise need[ed] rearrangement of the existing facilities" to accommodate the requested attachments in accordance with the foregoing specifications, MEC would notify Fibertech of the estimated cost of any make-ready work required to prepare the pole. Id., Article 8.3. Moreover, MEC reserved the right to deny Fibertech a license if MEC determined that the pole could not reasonably be rearranged or replaced to accommodate [Fibertech's] attachments. Id., Article 8.2. Further, Fibertech was required to pay for the make-ready

work before MEC would schedule the work within its "normal work load schedule." Id., Articles 4.2, 8.4 and 8.8.

The MEC Agreement also obligated Fibertech to construct and maintain, at its own expense, any approved attachments in a safe condition and in a manner acceptable to MEC, and MEC reserved the right to make periodic inspections of Fibertech's attachments at Fibertech's expense. Id., Articles 9.1.

In addition to obtaining the licenses from MEC, Fibertech was responsible "for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and/or maintain its attachment on public and private property at the location of [MEC's] poles . . . and shall submit to MEC evidence of such authority before making attachments on such public and/or private property." Id., Article 6.1. Similarly, Fibertech was obligated to "comply with . . . all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties hereto under [the Agreement]." Id., Article 6.2.

MEC is entitled to terminate the MEC Agreement with Fibertech and all authorizations granted pursuant thereto if Fibertech "shall fail to comply with any of the terms or conditions of th[e] Agreement or default in any of its obligations under th[e] Agreement, or if [Fibertech's] facilities are maintained or used in violation of any law and [Fibertech] shall fail within thirty (30) days after written notice . . . to correct such default or noncompliance." Id., Article 19.1. In the event of termination of the MEC Agreement, Fibertech is obligated to remove its attachments from MEC's poles within six months of the date of termination and must submit a plan and schedule for such removal within thirty (30) days of the date of termination. Id., 19.3. If any of Fibertech's

attachments are found attached to MEC's poles without a license, MEC, "without prejudice to its other rights or remedies under [the Agreement] (including termination) or otherwise, may impose a charge and require [Fibertech] to submit in writing, within fifteen (15) days after receipt of written notification . . . of the unauthorized attachment, a pole attachment application." If Fibertech fails to submit the requisite application in a timely manner, Fibertech is obligated to "remove its unauthorized attachment within fifteen (15) days of the final date for submitting the required application, or [MEC] may remove [Fibertech's] facilities without liability, and the expense of such removal shall be borne by [Fibertech]." Id., Article 12.1.

B. FIBERTECH'S UNAUTHORIZED ATTACHMENTS AND SAFETY HAZARDS

In late June 2002, MEC discovered that Fibertech had placed unauthorized attachments on over 200 poles covered by the MEC Agreement in the City of Northampton, Massachusetts. Many of these unauthorized attachments have been installed improperly and not in compliance with the specifications set forth in the MEC Agreement, giving rise to serious and substantial safety hazards for the public, MEC and Verizon personnel, as well as other pole users including telecommunications service providers and cable television operators. Fournier Affidavit, ¶¶ 8-14.

In particular, in placing its attachments Fibertech did not utilize guying, a metal cable of high-tensile strength that is attached to a pole and anchor rod, or another pole, for the purpose of reducing pole stress caused by the installation of high-tension wires. Additionally, Fibertech violated the NESC distance requirements by installing its cables in certain instances within 40 inches (measured vertically) of electrical wires in the supply space, and within 12 inches of cable in the communications space, creating a

serious risk of energizing communications lines and posing a potentially life-threatening hazard for technicians working on and around the poles. In some instances, Fibertech installed extension arms in a transparent attempt to create the appearance of compliance with the 40-inch vertical distance requirement, but because the extension arms extend horizontally they do not create a 40-inch vertical separation as required by code. Further, Fibertech has "boxed-in" poles by improperly placing attachments on both sides of poles in contravention of construction requirements, making pole replacement more difficult and preventing access by other pole users to their facilities. Fibertech has also created "mid-span crossovers" by attaching lines that run both above and below the lines of other users creating further risk of damage to the facilities of other users and increasing the likelihood of causing communications lines to become energized with high voltage electricity from the power lines of the electric company. Mid-span crossovers may cause friction between lines in windy conditions posing the threat of damage to lines, preventing access to lines by other users, and increasing the risk of electrifying communications lines, which would pose a substantial danger as described above. Moreover, Fibertech installed lines to CATV through-bolts, crushing the cable in some instances, and creating a further barrier for CATV technicians to access the CATV cable. Finally, Fibertech placed attachments on old, deteriorated poles that may not safely accommodate the additional loading that results from Fibertech's high-tension attachments. Because of their age and deteriorated condition, the additional load resulting from Fibertech's unauthorized attachments increase the risk that the poles may collapse threatening the safety of motorists and passers-by and creating an additional risk

of damage to the lines and equipment of the joint owners and other users on those poles. Fournier Affidavit, ¶¶ 15-21.

In placing these unsafe, unauthorized attachments, Fibertech also ignored the local approval process. Id., ¶ 23, Ex. A.

C. MEC'S TERMINATION OF THE MEC AGREEMENT

By letter dated July 15, 2002, MEC notified Fibertech of the unauthorized attachments in Northampton, and demanded that Fibertech take immediate remedial steps to cure its breaches under the MEC Agreement. Fibertech responded by letter dated July 22, 2002, denying that it lacked authority to attach to the poles that were the subject of MEC's letter of July 15, 2002. Anundson Affidavit, Exhs. C and D.

By letter dated July 25, 2002, Fibertech admitted that it had not received a license to make the attachments in Northampton. In this letter, Fibertech alleged that it was nevertheless authorized to attach to the poles in question by reason of the delays of MEC and Verizon to respond to Fibertech's pole license applications. Additionally, Fibertech denied any safety violations arising from its unauthorized attachments. Id., Exhs. E-G. Thus, Fibertech failed to address what it would do to correct the hundreds of unauthorized attachments it had placed on MEC-owned or jointly owned poles in Northampton, Massachusetts. Id., Exh. H.

In light of Fibertech's refusal to take responsibility for the foregoing breaches and safety violations, as well as MEC's subsequent discovery that Fibertech has made over 200 known unauthorized attachments, MEC gave Fibertech notice, by letter dated July 15, 2002, that if Fibertech failed to remove the unauthorized attachments prior to July 30, 2002, MEC would take whatever action was necessary, consistent with the terms and

conditions of the MEC Agreement, to address the unauthorized attachments placed by Fibertech. Id., Exh. I.

When Fibertech failed to remove its attachments or take any corrective action, MEC gave Fibertech notice of termination by letter dated September 18, 2002 for effect in 30 days. Id. at ¶ 11 and Exh. J.

D. THE PRELIMINARY INJUNCTIONS IN THE CONSOLIDATED ACTIONS OF VERIZON AND WMECO

On August 8, 2002, Verizon filed a Complaint against Fibertech seeking, among other things, relief in the form of an injunction (a) ordering Fibertech to remove approximately 700 unauthorized attachments on poles, owned solely by Verizon and jointly by Verizon and WMECO, in the towns of Agawam, Easthampton, Northampton, Springfield and West Springfield, Massachusetts, and (b) prohibiting Fibertech from making any further unauthorized attachments to Verizon's solely and jointly-owned poles. As in this case, Fibertech installed these attachments in violation of two applicable Aerial License Agreements that required Fibertech to apply for and receive a license, pay for and complete any necessary make-ready work, and obtain the requisite local approvals before making any attachments. Further, Fibertech installed its unauthorized attachments without adhering to applicable safety standards, thereby creating potentially dangerous conditions for pole technicians and the public.

On August 13, 2002, WMECO filed a parallel action arising from Fibertech's placement of hundreds of unauthorized attachments on poles owned solely by WMECO, and jointly by WMECO and Verizon. On WMECO's motion, the Court consolidated the Verizon and WMECO actions.

On August 19, 2002, under facts virtually identical to this case, this Court (Wernick, J.) granted Verizon's application, and WMECO's motion, for preliminary injunction against Fibertech, thereby preliminarily enjoining Fibertech's unauthorized attachments. A copy of the Court's Memorandum and Decision is attached hereto as Exhibit A. More specifically, the injunctions provided, in relevant part, as follows:

> 1. Fibertech is to make no further attachments to any poles owned by Verizon or Verizon and WMECO jointly without express written authorization from the owner(s) of the pole or from this Court or the DTE; and
>
> 2. Fibertech, at its sole election, shall either (a) remove within 45 days of this order all attachments and associated cable, fiber or other materials of any kind on all poles owned by Verizon and/or Verizon and WMECO for which it has not received an express license in writing from the pole's owner, or (b) deliver in hand to Keefe Clemons, as attorney for Verizon, within ten days of this order, cash or its equivalent in the amount of discretion $400,000, to be held by Mr. Clemons and disbursed by him as follows:
>
> To pay for corrections (which must be made within sixty days of the receipt of such funds) of all conditions to which the Plaintiffs in their sole discretion determine that the attachments were a substantial contributing factor and which the Plaintiffs in their sole discretion determine to be hazards to the health, safety and welfare of their employees, their licensees, or the public. . . .

Exh. A, hereto at 10-11 (emphasis in original) (footnote omitted).

In entering the preliminary injunctions, the Court specifically found that Verizon and WMECO are suffering substantial irreparable harm as a result of Fibertech's unauthorized pole attachments, that Verizon and WMECO have established a strong likelihood of success on the merits of their claims arising therefrom, and that the balance of the relative harms tips heavily in favor of Verizon and WMECO. Id., at 5-7.

III. ARGUMENT

A. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

In deciding whether to grant an application for a preliminary injunction, the court will ordinarily consider and balance three factors: (1) whether denial of the request for the injunction will subject the moving party to a substantial risk of irreparable harm; (2) any similar risk of irreparable harm which granting the injunction would create for the opposing party; and (3) the moving party's likelihood of success on the merits. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). In an appropriate case, the risk of harm to the public interest may also be considered. Town of Brookline v. Goldstein, 388 Mass. 443, 447 (1983). The issuance of a preliminary injunction generally rests within the sound discretion of the trial judge after a combined evaluation of the moving party's claim of injury and chance of success on the merits. Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980); T & D Video, Inc. v. City of Revere, 423 Mass. 577, 580 (1996).

The party seeking the injunction bears the burden of showing a likelihood of success. Robinson v. Secretary of Administration, 12 Mass. App. Ct. 441, 451 (1981). The moving party must also demonstrate that the denial of the injunction would cause the party irreparable harm. Packaging Indus. Group, Inc., 380 Mass. at 621-22. A moving party experiences irreparable injury if there is no adequate remedy at final judgment. GTE Products Corp. v. Stewart, 414 Mass. 721, 724 (1993). In other words, the plaintiff must show that, without the requested relief, it may suffer a loss of rights that cannot be vindicated by a final judgment, rendered either at law or in equity, should it prevail after a full hearing on the merits. Id. at 726 (citations omitted). "What matters as to each

party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits." Packaging Indus. Group, Inc., 380 Mass. at 617. Where the moving party can demonstrate "both that the requested relief is necessary to prevent irreparable harm to it and that granting the injunction poses no substantial risk of such harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction." Id. at 617 n.12.

For the reasons discussed below, and given this Court's ruling under virtually identical circumstances in the consolidated actions of Verizon and WMECO, there is a substantial likelihood that MEC will succeed on the merits of its claims, MEC will suffer irreparable harm in the absence of the requested relief, the balance of harms weighs in MEC's favor, and injunctive relief will serve the public interest.

B. MEC HAS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS FOR DECLARATORY JUDGMENT, BREACH OF CONTRACT, TRESPASS AND VIOLATION OF MASS. GEN. L. CH. 166, § 35

In this action, MEC has asserted claims against Fibertech for declaratory judgment, breach of contract, trespass and violation of Mass. Gen. L. ch. 166, § 35. As discussed below, there is a strong likelihood that MEC will succeed on the merits of these claims. MEC's contracts with Fibertech are substantially the same in relevant part to Verizon's contracts with Fibertech, and Fibertech's actions in Northampton with respect to MEC's poles, both jointly and solely owned in Northampton, are identical to its actions as to Verizon.

1. MEC Is Entitled To A Declaratory Judgment That Fibertech Breached The Agreement And Failed To Cure The Default And MEC Is Entitled To Terminate The Agreement And Remove Or Have Fibertech Remove The Unauthorized Attachments At Fibertech's Expense

MEC is entitled to a declaratory judgment that Fibertech clearly breached the MEC Agreement and failed to cure the default within 30 days after notice thereof, and that MEC is therefore entitled to terminate the MEC Agreement and remove or have Fibertech remove the unauthorized attachments at Fibertech's expense.

To establish a claim for declaratory judgment, the complaint must on its face disclose the existence of an actual controversy, Mass. Gen. L. ch. 231A, § 1; District Attorney for Suffolk Dist. v. Watson, 381 Mass. 648, 659 (1980), and that the controversy must be one that has an immediate impact on the rights of the parties. See Quincy City Hospital v. Rate Setting Com., 406 Mass. 431 (1990); see also Massachusetts Ass'n of Independent Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 292 (1977); School Committee of Cambridge v. Superintendent of the Schools of Cambridge, 320 Mass. 516, 518 (1946).

The applicable terms of the MEC Agreement that governs the parties' relationship in this case unequivocally give MEC the right to terminate the MEC Agreement with Fibertech and all authorizations granted pursuant thereto if Fibertech "shall fail to comply with any of the terms or conditions of th[e] Agreement or default in any of its obligations under th[e] Agreement, or if [Fibertech's] facilities are maintained or used in violation of any law and [Fibertech] shall fail within thirty (30) days after written notice . . . to correct such default or noncompliance." Anundson Affidavit, Exh. A, Article 19.1 (emphasis supplied). Moreover, the MEC Agreement clearly states that if any of Fibertech's attachments are found attached to MEC's poles without a license, MEC, "without

prejudice to their other rights or remedies under [the Agreement] (including termination) or otherwise, may impose a charge and require [Fibertech] to submit in writing, within fifteen (15) days after receipt of written notification . . . of the unauthorized attachment, a pole attachment application." Id., Article 12.7. Upon termination, Fibertech is obligated to remove its attachments from MEC's poles within six months of the date of termination and must submit a plan and schedule for such removal within thirty (30) days of the date of termination. Id., Article 19.3.

Fibertech has clearly breached the terms and conditions of the MEC Agreement and it has defaulted on its obligations thereunder by virtue of making over 200 known unauthorized attachments to MEC-owned poles, and by failing to construct those attachments in safe manner in compliance with the applicable safety and construction codes as required under the MEC Agreement. Indeed, Fibertech has not denied, nor can it, that it has placed the unauthorized attachments on poles covered by the MEC Agreement. On the contrary, Fibertech merely contends that it had a right to make the attachments in question because of delays in the licensing process. Anundson Affidavit, Exhs. D, G and H. Moreover, despite Fibertech's conclusory denials, Fibertech cannot refute the fact that it failed to allow the requisite make-ready work to be completed, obtain local approvals, or construct the attachments in a safe condition (as more fully discussed below) and in a manner acceptable to MEC.

Accordingly, in light of Fibertech's flagrant breach of the terms and conditions of the MEC Agreement and default on its obligations, there is a substantial likelihood that MEC, like Verizon and WMECO, will succeed on its claim for declaratory judgment.

2. Like Verizon And WMECO, MEC Has A Strong Likelihood Of Success On The Merits Of Its Claims For Violation Of Mass. Gen. L. ch. 166, § 35 And Trespass

There is a strong likelihood that MEC, like Verizon and WMECO, will prevail on its claim pursuant to Mass. Gen. L. ch. 166, § 35, which provides as follows:

> A corporation or person maintaining or operating telephone, telegraph, television or other electric wires or any other person who in any manner affixes or causes to be affixed to the property of another any pole, structure, fixture, wire or other apparatus for telephonic, telegraphic, television or other electrical communication, or who enters upon the property of another for the purpose of affixing the same, without first obtaining the consent of the owner or lawful agent of the owner of such property, shall, on complaint of such owner or his tenant, be punished by a fine of not more than one hundred dollars.

Mass. Gen. L. ch. 166, § 35.

Here, as it did in four other towns, Fibertech affixed its dark fiber optic cables to over 200 MEC-owned poles in Northampton without first obtaining a license and, therefore, it did not have MEC's consent. A number of those poles are jointly owned with Verizon, and are the already the subject of this Court's August 19, 2002 preliminary injunction. Accordingly, it is clear that Fibertech violated Mass. Gen. L. ch. 166, § 35, and Fibertech is subject to fines of not more than $100 for each such violation.

Additionally, in light of the Court's findings in its Memorandum of Decision on Verizon's application, and WMECO's motion, for preliminary injunction, MEC clearly has a strong likelihood of success on the merits of its claim for trespass. In that regard, the Court explicitly found under circumstances identical to this case, that "Fibertech has made attachments to plaintiffs' poles without right to do so and is therefore committing a continuing trespass with respect to each such pole. [Verizon and WMECO], consequently, have established a very strong likelihood of success on their claims that

Fibertech had no right to make attachments when it did and no right presently to these attachments on [Verizon's and WMECO's] poles." Exh. A hereto, at 5-6. See also, id. at 6, citing, Ferrone v. Rossi, 311 Mass. 591, 593 (1942) ("It is the general rule in this Commonwealth that the owner of land is entitled to a mandatory injunction to require the removal of buildings and structures that have been unlawfully placed upon his land, and the fact that plaintiff has suffered little or no damage on account of the offending building or structures, or that the wrongdoer was acting in good faith, or that the cost of removing the building or structure will be greatly disproportionate to the benefit to the plaintiff resulting from their removal is ordinarily no bar the granting of injunctive relief. . . . A continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass."). Given the overwhelming similarities between this case and the consolidated actions of Verizon and WMECO, MEC clearly has a strong likelihood of success on the merits of its claim for trespass.

C. LIKE VERIZON AND WMECO, MEC WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF THE REQUESTED INJUNCTIVE RELIEF

Like Verizon and WMECO, MEC will unquestionably suffer irreparable harm in the absence of preliminary injunctive relief enforcing the licensing scheme set forth in the MEC Agreement, which establish the terms and conditions by which MEC provides nondiscriminatory access to all qualified attachees as required by the Telecommunications Act of 1996, 47 U.S.C. § 101, et seq. (Pub. L. No. 104-104, 110 Stat. 56 (1996)). By placing the attachments in question without MEC's authorization, Fibertech has bypassed the established process by which MEC ensures the safe and orderly attachment by all putative licensees. If Fibertech's misconduct is permitted to go

unchecked, there will be nothing to prevent others from attaching to MEC's poles without authorization and ignoring the local approval process, while at the same time refusing to perform necessary make-ready work and ignoring safety standards as Fibertech has done.

As was the case with Verizon and WMECO, the licensing process mandated in the MEC Agreement is designed, in part, to ensure the integrity of MEC's equipment and that of others, as well as the safety of its workers, joint owners, third party users and the public. As previously described, Fibertech has installed its unauthorized attachments in a manner that unreasonably threatens the safety and welfare of MEC's employees and contractors who work on these poles as well as the safety of employees and authorized contractors of other companies that maintain facilities on those poles, such as cable television operators and telecommunications service providers. The unauthorized attachments also present a threat to the equipment maintained on those polls by MEC and other companies and potentially threatens the services of MEC and other companies who maintain facilities on those poles, including electric and telephone service.

As in the Verizon and WMECO consolidated actions, the threat of irreparable harm occasioned by Fibertech's conduct is all the more imminent by virtue of the fact that it will be extremely difficult for MEC to enforce its rights and to ensure compliance with safety standards if Fibertech is not stopped before it leases its dark fiber optic network to third parties who may then arguably acquire rights therein adverse to MEC's legitimate interests. For these reasons MEC is faced with an immediate and substantial threat of irreparable harm unless this Court grants the requested injunctive relief.

D. AS IN THE VERIZON AND WMECO CASES, THE BALANCE OF THE RELATIVE HARMS AND THE PUBLIC INTEREST WEIGH HEAVILY IN FAVOR OF GRANTING INJUNCTIVE RELIEF

The injunctive relief requested by MEC, already granted for Verizon and WMECO, will merely force Fibertech to comply with terms and conditions of the MEC Agreement and all other applicable laws, regulations, codes, construction and safety standards and the like with which MEC contractually agreed, and is legally obligated, to comply. As such, Fibertech will not suffer any harm if injunctive relief is granted to MEC. By contrast, for the reasons discussed immediately above, MEC faces an imminent threat of irreparable harm in the absence of injunctive relief. If Fibertech is permitted to continue its trespass upon MEC's facilities and to flout its contractual and legal obligations, not only will MEC suffer harm, but also MEC's employees and employees of cable television operators and telecommunications service providers are at risk.

Finally, in light of the potential threat of irreparable harm to the public safety, potential disruption of cable, phone and electric and other services, the public interest will be served by granting the requested injunctive relief.

In the Verizon and WMECO cases, the Court similarly balanced the relative harms, and concluded that the balance weighed heavily against Fibertech.

IV. CONCLUSION

Wherefore, based upon the foregoing points and authorities, MEC respectfully requests that this Honorable Court grant its application for preliminary injunctive relief, as it did against Fibertech in the Verizon and WMECO consolidated actions.

MASSACHUSETTS ELECTRIC COMPANY,

Respectfully submitted,

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Dated: September 16, 2002

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 02-831
CONSOLIDATED WITH
CIVIL ACTION NO. 02-843

VERIZON NEW ENGLAND, INC., d/b/a VERIZON MASSACHUSETTS, Plaintiff	)	CIVIL ACTION NO. 02-831
vs.	)	CONSOLIDATED WITH
FIBERTECH NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC	)	
WESTERN MASSACHUSETTS ELECTRIC COMPANY	)	CIVIL ACTION NO. 02-843
vs.	)	
FIBERTECH NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC Defendants	)	

MEMORANDUM OF DECISION ON PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

On August 5, 2002, Verizon New England, Inc., d/b/a Verizon Massachusetts ("Verizon") commenced suit in this Court against Fibertech Networks,LLC, f/k/a Fiber Systems, LLC ("Fibertech") alleging that Fibertech had breached a license agreement between Verizon and Fibertech, that Fibertech had violated G. L. c. 166, §35, requesting a declaratory judgment that Verizon be permitted to terminate the license agreement with Fibertech and seeking injunctive relief requiring Fibertech to remove unauthorized attachments to utility poles of Verizon and prohibiting

Fibertech from making further unauthorized attachments. Contemporaneously with filing suit, Verizon sought and obtained a short Order of Notice setting a hearing date of August 14, 2002 on its Motion for Preliminary Injunction.

On August 13, 2002, Western Massachusetts Electric Company ("WMECO") also filed suit against Fibertech alleging that Fibertech had breached a separate licensing agreement with WMECO and Verizon, that Fibertech was in violation of G. L. c. 166, §35 and seeking injunctive relief requiring Fibertech to remove or to make safe numerous unauthorized attachments to utility poles jointly owned by WMECO and Verizon and prohibiting Fibertech from making further unauthorized attachments. WMECO sought and obtained a short Order of Notice returnable on August 14 for hearing on its Motion for Preliminary Injunction. The Court also allowed WMECO's Motion to Consolidate these actions.

On August 14, 2002, the Court heard argument on Fibertech's Emergency Motion to Continue the Hearing on WMECO's Motion for Preliminary Injunction (but not Verizon's) which the Court denied and then heard argument from all parties on the consolidated motions for preliminary injunction. After consideration of the oral arguments and the extensive submissions of all of the parties, the Court concludes that preliminary injunctions should enter in favor of Verizon and WMECO as further stated in this Memorandum of Decision.

The facts which this Court believes are relevant to disposition of the preliminary injunction motions will be set forth in the memorandum to the extent necessary to explain the Court's decision. On or about March 7, 2000, Verizon, which was then known as New England Telephone and Telegraph Company, d/b/a Bell Atlantic-New England, entered into a license agreement with Fibertech which, inter alia, established the terms and conditions pursuant to which Fibertech would

be permitted to attach certain telecommunication facilities ("attachments") to utility poles ("poles") owned by Verizon (the "Verizon Agreement"). On March 31, 2000, WMECO and Verizon, as joint licensors, entered into a license agreement with Fibertech, as licensee, which also set forth the terms and conditions pursuant to which Fibertech would be permitted to make attachments to poles jointly owned by WMECO and Verizon (the "WMECO Agreement"). For all purposes relevant to the motion before this Court, the WMECO Agreement is identical to the Verizon Agreement. This form of agreement, including its rates and terms and conditions has been fully investigated by the Massachusetts Department of Communication and Energy ("DTE"). The DTE, therefore, has determined that the agreements on their face are non-discriminatory and otherwise appropriate.

Although both parties have raised numerous issues of varying complexity, many of which may have to be resolved at trial, or by motion proceedings before trial, the motions currently before the Court, reduced to their essence, seek to enjoin a continuing trespass to property of Verizon and WMECO from the alleged unauthorized presence of Fibertech's attachments on Verizon's poles and on poles jointly owned by Verizon and WMECO. Although neither complaint contains a count sounding in trespass, this is clearly the basis for the counts in each complaint seeking injunctive relief. The determinative issue, in this Court's view, therefore is quite simple: did Fibertech have the right to make the attachments in dispute absent an express license under the Verizon Agreement and the WMECO Agreement and without the express consent of Verizon and WMECO or an order from a court of competent jurisdiction or from the DTE?

Without citation to any appellate case or any decision of any administrative body in this Commonwealth or in any other state, and without citation to any decision by any Federal court, Fibertech asserts that it had such right. Fibertech relies entirely on an administrative order and

request for information on a pole attachment complaint in which the Federal Communications Commission ("FCC") interpreted 47 C.F.R. §1.1403 (b) to mean that a pole owner "must deny a request for access within forty-five days of receiving such a request or it would otherwise be deemed granted." In the matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company, 15 F.C.C.R. 9563, 2000 WL-1060425 (F.C.C).[1] From this statement in Cavalier, Fibertech makes the quantum leap of logic that Fibertech's applications for pole attachments to Verizon and to WMECO and Verizon must all be deemed to have been granted and, therefore, that Fibertech had the right to make the attachments without the express consent of the plaintiffs.[2] Nothing in Cavalier supports Fibertech's conclusion that a licensor's failure to comply with the forty-five day rule entitles

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[1]47 CFR §1.1403 (b) provides that a "request for access to a utility's poles, ducts, conduits or rights of way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."

[2]Fibertech first began to file applications for pole attachments in October 2000 and continued to file such applications through April 2002. It appears to be undisputed that all of the pole attachments issued in this case were neither denied nor explicitly granted within forty-five days of the date of the application. In this Commonwealth, the regulations of the DTE, not 47 CFR §1.1403 (b) are controlling. The applicable regulation in the Commonwealth, however, is in all material respects identical to that of the FCC. No party has brought to the Court's attention any decision by any court of this Commonwealth or by the DTE holding that failure to deny a request within 45 days of its receipt results in its being deemed to have been granted. The relevant regulation is 220 CMR, §45.03 (b) which provides "requests for access to a utility's poles, ducts, conduits, rights-of-way owned or controlled, in whole or in part, by one or more utilities must be in an adequately descriptive writing directed to an appropriate named recipient designated by the utility. The utility is required to make such a designation. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant information supporting its denial, and shall explain how such information relates to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."

a licensee to enter upon property of the licensor and to make attachments to the licensor's poles without permission from the licensor or an order from a court or from an appropriate administrative body. Indeed, in Cavalier, the complainant filed its pole attachment complaint and prosecuted it to completion before making any attachments. The issue of the right to attach based solely upon a implied grant of license arising from the expiration from the forty-five day limit, without court or administrative approval, was not before the FCC. The FCC's decision in Cavalier, furthermore, supports the Plaintiffs in this case, not Fibertech, because the decision provided with respect to the pole applications which had not been denied within 45 days that "Respondent SHALL PROCEED TO APPROVE WITHOUT DELAY all applications by Complainant for access to poles to which attachment can be made permanently or temporarily without causing a safety hazard, for which permit applications have been filed with Respondent for longer than forty-five days." [underlining supplied] Cavalier, at 9578. The FCC, therefore, did not even order approval of all applications that had been filed for longer than 45 days without being denied. Consequently, there is no authority whatsoever for the proposition that the mere lapse of time automatically entitles an applicant to make attachments to poles or to decide unilaterally what make ready work is required to insure that attachments may be made safely.[3]

The Court concludes, therefore, that Fibertech has made attachments to plaintiffs' poles without right to do so and is therefore committing a continuing trespass with respect to each such pole. Plaintiffs, consequently, have established a very strong likelihood of success on their claims that

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[3]Whether the so-called forty-five day rule has been violated by the Plaintiffs is heavily contested in this case, but need not be resolved for purposes of this preliminary injunction proceeding, because whether the rule was violated or not, Fibertech had no right to place attachments on the plaintiffs' poles without permission from the plaintiffs or an appropriate order from a court of competent jurisdiction or the DTE.

Fibertech had no right to make attachments when it did and no right presently to these attachments on Plaintiffs' poles. This Court has jurisdiction to provide injunctive relief against common law continuing trespasses under the circumstances presented here.[4]

Fibertech argues in the alternative that injunctive relief must be denied because Plaintiffs have unclean hands by virtue of their alleged breaches of contract and because the balance of the harms favors Fibertech. With respect to the balance of harm, the Court concludes that the scales tip heavily in favor of Plaintiffs. "It is the general rule in this Commonwealth that the owner of land is entitled to a mandatory injunction to require the removal of buildings and structures that have been unlawfully placed upon his land, and the fact that plaintiff has suffered little or no damage on account of the offending buildings or structures, or that the wrongdoer was acting in good faith, or that the

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[4]Fibertech has also argued that this Court lacks jurisdiction to consider injunctive relief based either on the doctrine of preemption, or the doctrine of primary jurisdiction. Whatever the merits of Fibertech's preemption and primary jurisdiction arguments may be as applied to other issues which are unnecessary for the Court to resolve in this preliminary injunction proceeding, this Court is not divested of jurisdiction to provide preliminary injunctive relief while those other issues are being resolved in whatever the appropriate forum might be. Fibertech has been unable to provide any authority to this Court for the proposition that preliminary injunctive relief is available at the DTE and the Court has found none. Furthermore, whatever may ultimately be found by this Court or the DTE with respect to the lawfulness or fairness of the Plaintiffs' application of the terms and conditions of the Verizon Agreement and the WMECO Agreement to Fibertech's applications and the amount of make ready costs properly payable by Fibertech, if any, will not affect in any way Fibertech's current status as a trespasser. Finally, the Court notes that it was Fibertech, not Plaintiffs, which first took action to deny the other parties' rights to redress, which Fibertech now argues should have been presented to the DTE. Fibertech did so by deciding for itself that it was permitted to ignore contract provisions which it believed were being applied in a discriminatory manner by Plaintiffs, but which no Court or the DTE had yet determined were being applied improperly. Fibertech did so when it took the law into its own hands and erected attachments on Plaintiffs' poles in the absence of any legal precedent for doing so. By contrast, Plaintiffs have taken the prudent course of requesting relief from a court, rather than resorting to self help and removing the attachments despite the fact that Plaintiffs have the benefit of explicit self help provisions in each license agreement.

cost of removing the building or structure will be greatly disproportionate to the benefit to the plaintiff resulting from their removal is ordinarily no bar to the granting of injunctive relief . . . A continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass." (citations omitted) Ferrone v Rossi, 311 Mass. 591, 593 (1942). In the instant case, however, the Court finds that Plaintiffs have suffered substantial damage and that Fibertech has not acted in good faith in erecting the attachments.

The attachments have resulted in significant safety violations on a substantial number of Plaintiffs' poles which represent a danger to the health and safety of Plaintiffs' employees and to the public and which threatens the continuity and quality of services being provided to Verizon and WMECO customers and customers of others with attachments on poles owned by Verizon or by Verizon and WMECO jointly. In addition, the Court draws the inference from the facts before it that the placement of the attachments without the make ready work required by Paintiffs having been performed, has affected adversely the ease, cost and manner of making appropriate modifications, which must now be made with the attachments in place.[5]

Fibertech, furthermore was not acting in good faith when it resorted to self help. As previously noted, there was no legal authority anywhere supporting Fibertech's resort to self help under these circumstances. Furthermore, although some of Fibertech's applications had been pending

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[5]The Court makes no finding whether it would have been Fibertech's or Plaintiffs' responsibility to pay the costs of performing the make ready work on the poles before the attachments had been made, or whether some or all of the safety violations were preexisting violations that have been exacerbated by the attachments. That is not the relevant inquiry now that the attachments have been made without the needed make ready work having been performed by someone, at someone's expense.

for over two years, Fibertech never sought the assistance of the DTE or of a court of law and never asserted in writing to the Plaintiffs any claim of a grant of license by failure to comply with the so called 45 day rule before resorting to self help. Nothing in the record before the Court explains why Fibertech could not have taken its dispute to court or to the DTE before resorting to self help, or why Fibertech failed to advise plaintiffs of its intentions before erecting the attachments[6]. The Court infers from this record that Fibertech deliberately resorted to self help, before instituting proceedings at the DTE and before advising Plaintiffs of its claims to licenses and its intention to make attachments, in order to present Plaintiffs and the DTE or a court of law with a fait accompli; thereby appropriating to itself all the benefits of a license and positioning itself to argue that a removal order would substantially harm Fibertech and subject it to undue and wasteful costs. Having unjustifiably and, in this Court's view, unlawfully created the likelihood of precisely the injunctive relief which it now contends will irreparably harm it and offering no compelling reason why court or DTE approval could not have been sought before erecting the attachments, Fibertech is in no position to argue that any harm it might suffer from preliminary relief outweighs the harm to Plaintiffs which would result from permitting the attachments to remain in place.

Finally, for the same reasons, Fibertech's argument that Plaintiffs have unclean hands must also fail. The Court need not resolve the issue of the propriety of the Plaintiffs' actions under the license agreements and the applicable law. On this record, there is a substantial factual dispute regarding that issue as to which both sides have made compelling arguments. The record, however,

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[6]Although the record is unclear as to precisely when the attachments were made and when and how Plaintiffs first learned of them, it appears uncontroverted that the attachments were made around June, 2002, and that Plaintiffs were not advised in advance that the attachments were going to be erected.

is very clear that Fibertech acted wrongfully in erecting the attachments and did so to obtain an inappropriate tactical advantage in litigation it knew was forthcoming. There is nothing unfair about forcing Fibertech to accept the consequences of the very risk it knowingly and unreasonably assumed.

Nevertheless, the Court is mindful that it might be wasteful for Fibertech to have to remove attachments from all poles at issue in this case (over 700). As a result of this litigation, it is possible that Fibertech will receive permission to attach to some or all of the poles. The Court also recognizes that the primary concern expressed by both WMECO and Verizon at the hearing is the allegedly unsafe conditions presently existing on a substantial number of the poles for which Fibertech's attachments are either the sole cause or a substantial contributing factor. At the same time, the Court is unwilling to enter an order which would require the Court to make determinations in connection with the issuance of a preliminary injunction or the enforcement of that injunction regarding some of the ultimate issues of fact in this case, including, but not limited to, what are the appropriate safety requirements for each of the poles in question, whether those requirements have been complied with and whether Fibertech or the Plaintiffs ultimately have the burden of paying for achieving compliance The Court, furthermore, is unwilling to have to continue to monitor the conduct of the parties pursuant to any injunctive relief issued by the Court.

The Court also finds for the reasons stated in the body of this memorandum that there is good cause to relieve Plaintiffs of the obligation to give security under Mass. R. P. 65 (c). No such security, therefore, shall be ordered by the Court.

ORDER

For all of the above reasons, the Court allows the Plaintiffs' Motions for Preliminary Injunction and orders preliminary injunctions be entered in each case as follows:

1. Fibertech is to make no further attachments to any poles owned by Verizon or by Verizon and WMECO jointly without express written authorization from the owner(s) of the pole or from this Court or the DTE; and

2. Fibertech, at its sole election, shall either (a) remove within 45 days of this order all attachments and associated cable, fiber or other materials of any kind on all poles owned by Verizon and/or Verizon and WMECO for which it has not received an express license in writing from the pole's owner, or (b) deliver in hand to Keefe Clemons, as attorney for Verizon, within ten days of this order, cash or its equivalent in the amount of $400,000, to be held by Mr. Clemons and disbursed by him as follows:

> To pay for corrections (which must be made within sixty days of the receipt of such funds) of all conditions to which the Plaintiffs in their sole discretion determine that the attachments were a substantial contributing factor and which the Plaintiffs in their sole discretion determine to be hazards to the health, safety and welfare of their employees, their licensees, or the public. Such funds shall first be disbursed to pay for such corrections to poles under the WMECO Agreement. To the extent funds remain, they shall be disbursed to pay for such corrections to poles under the Verizon Agreement. Any portion of the $400,000 not used for such purpose by the Plaintiffs shall be returned to Fibertech not later than thirty days after completion of all such corrections (which corrections are to be completed within sixty days of the initial receipt of the funds).[7]

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[7]It is the Court's intention that the need for such corrections shall, in the first instance, be determined by the Plaintiffs in their sole discretion and that such exercise of discretion shall not be

The alternatives presented in sub-paragraph two are all or nothing alternatives. Fibertech may not choose to remove its attachments from some of the poles and to pay for corrections of conditions existing on other poles. Fibertech must either remove all of its attachments from all of the poles at issue in this case, approximately 700, or it must tender the full $400,000 to Mr. Clemons from which the Plaintiffs will pay for corrections to any and all of the utility poles at issue in this case which they, in their sole discretion, determine to be hazardous to the health, safety and welfare of their employees,

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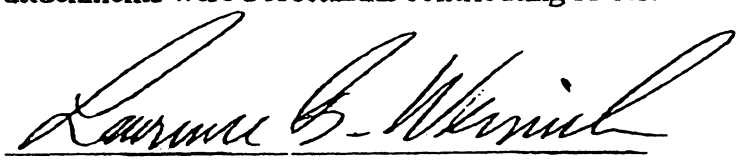
open to challenge by Fibertech until the corrections have been completed. Should Fibertech, therefore, chose this option instead of removal of attachments from all utility poles at issue in this case, Fibertech will be waiving any right to challenge before completion of the corrections Plaintiffs' exercise of discretion in determining what conditions need to be corrected, the manner in which they need to be corrected and the cost of such corrections Nothing herein, however, shall prohibit Fibertech from thereafter asserting in this litigation that some or all of the corrections were not corrections of conditions constituting hazards to the health, safety and welfare of plaintiffs' employees, licensees or the public, that such corrections were not corrections of conditions to which the attachments were a substantial contributing factor, that the corrections were made in an unreasonable manner or that the charges for such corrections were excessive and that Fibertech, therefore, should be able to recoup in this litigation such portion of the $400,000 as was expended by the Plaintiffs improperly. Furthermore, it is the Court's intention that Fibertech pay to correct (without right of repayment) safety hazards to which it's attachments were a substantial contributing factor, even if it should ultimately be determined that such corrections, or some portion of them, would not have been Fibertech's responsibility to pay in whole or in part under the Verizon and WMECO Agreements had they been performed as make ready work before the attachments were made. By electing the option of depositing $400,000 with Mr. Clemons, Fibertech will be deemed to have waived this theory as a basis to recover funds expended for such corrections.

their licensees or the public and to which the attachments were a substantial contributing factor.



Lawrence B. Wernick
Justice of the Superior Court

Dated: August 19, 2002

A:\verizon.wpd

Attachment D

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

TRIAL COURT OF THE
COMMONWEALTH
SUPERIOR COURT DEPTARTMENT
Civil Action No.

02 983

MASSACHUSETTS ELECTRIC COMPANY,

Plaintiff,

v.

FIBERTECH NETWORKS, LLC, f/k/a FIBER SYSTEMS, LLC,

Defendant.

AFFIDAVIT OF PAMELA JO FOURNIER

I, PAMELA JO FOURNIER, do hereby state and depose as follows:

1. In October 1985, I started employment with National Grid, formerly known as New England Electric System. Since September 1998, I have functioned as an Operations Engineer for the Massachusetts Electric Company ("MECo") Northampton service area. My duties and responsibilities include field engineering of aerial project license applications for attachments to poles owned solely or jointly by MECo. I perform field engineering, process pole license applications, create make-ready estimates and work orders, and serve as the MECo contact for the applicant.

2. As part of my job, I am required to be knowledgeable of all applicable construction requirements relating to pole attachments and safety codes, including but not limited to the requirements and specifications in the latest editions of our Company's

Overhead Construction Standards, telephone company standards, the National Electric Code ("NEC"), the National Electrical Safety Code ("NESC"), and rules and regulations of the Occupational Safety and Health Act ("OSHA") and other governing authorities.

3. I am knowledgeable of and understand MECo's Third Party Pole Attachment procedures. FiberTech was required to apply for a license prior to installing any attachments on utility poles. Such terms and conditions were set forth in MECo's Aerial License Agreement # 0125 with FiberTech's predecessor, Fiber Systems, L.L.C. on March 17, 2000, which govern attachments to poles owned solely and jointly by MECo.

4. Under this agreement, FiberTech (the "licensee") must submit an Application for Pole Attachment License for all specific poles on which they wish to attach. Before MECo approves such attachments, the licensee is required to pay a field survey fee. Upon receipt of this fee, MECo performs the field survey and creates a make-ready estimate that identifies work necessary to prepare the poles to accommodate the requested attachments in accordance with applicable codes and standards. After the licensee pays the make-ready estimate, MECo performs the work. Upon completion of this necessary make-ready work, the licensee is then formally authorized to attach.

5. In my role as Engineer, I have received numerous aerial license applications submitted by FiberTech Networks, L.L.C., ("FiberTech") and I have personal knowledge regarding the status of each of those applications. I performed all of the field surveys for pole applications submitted by FiberTech to MECo for the City of Northampton.

6. After FiberTech submitted its initial wave of applications, but before any field surveys were conducted, MECo, Verizon and FiberTech met to discuss the construction, maintenance, and safety standards that FiberTech would be required to follow in making attachments to utility poles in Western Massachusetts.

7. Between July 2000 and February 2002, FiberTech sent to MECo applications seeking to make attachments to hundreds of poles in MECo's Western Massachusetts service area. In connection with these applications, MECo has worked closely with FiberTech, advising them of the necessary steps for securing these attachments. In addition, MECo provided FiberTech with the written policies and procedures setting forth the various provisioning options available to FiberTech.

8. From the beginning, FiberTech appeared reluctant to comply with the licensing requirements. FiberTech often disputed and questioned vertical clearance standards set forth by the NESC and adhered to by MECo. FiberTech was not always available to accompany MECo on their field survey expeditions. Also, FiberTech paid some field survey fees for applications that were later cancelled.

9. On June 24, 2002 (Monday), while working on West Street in Northampton, I noticed a new fiber cable attached to the poles. This cable was not there on June 21, 2002 (Friday). Unable to identify the owner, I contacted Verizon, A.T. & T. Broadband, and other authorized attachers, asking them about this mysterious cable that had apparently been installed during the night and over the weekend. After traveling the route of the new cable, I concluded it belonged to FiberTech. Verizon soon confirmed these suspicions and relayed the information that FiberTech had admitted the cable belonged to FiberTech.

10. Once the cable was identified as belonging to FiberTech, I followed the path of the cable in MECo's Northampton service area. This route extends from the Easthampton Town Line, North on Mount Tom Road (a.k.a. Route 5), to Fulton Avenue, to Conz Street, to Old South Street; then goes underground in Verizon owned facilities to Verizon's Masonic Street Central Office; then exits out of the Central Office underground, and rises on Pole 4 Center Street. From here it travels Northwesterly to State Street, North to Bedford Terrace, then South on Elm Street to West Street (a.k.a. Route 66). The cable continues on Route 66 to Earle Street, South on Earle to Texas Road, and to Easthampton Road (a.k.a. Route 10), to the Easthampton Town Line. I confirmed 214 unauthorized FiberTech attachments along this route. A number of these poles were never included in any application by FiberTech for attachment. While I attempted to identify poles in Northampton with FiberTech attachments, I cannot be certain that I have identified all poles in Northampton or elsewhere in MECo's service territory with unauthorized FiberTech attachments.

11. The following table summarizes applications submitted by FiberTech, location and number of poles involved, status of make-ready work, and confirmed unauthorized FiberTech attachments:

Municipality	Application # And Date	Location	# Poles/Licensing Status	Status of Make-Ready Work
Northampton	NOR 8-2-20 03/17/2000	Bridge Street	Applied for: 29 Actual: 39 No poles licensed.	All poles surveyed; Make ready estimate prepared; Application cancelled.
Northampton	NOR 9-1-21 03/17/2000	Masonic St Center St State St Bedford Terr Elm St West St Earle St Texas Rd Easthampton Rd	Applied for: 105 Actual: 142 No poles licensed. **FT attached to 131 poles.**	All poles surveyed; Make ready estimate prepared and sent 01/11/2002. **24 poles not listed on application.**
Northampton	SPR 12-4-Z 06/25/2001	Mt. Tom Rd Pleasant St	Applied for: 61 Actual: 62 No poles licensed. **FT attached to 51 poles.**	All poles surveyed; Make ready estimate prepared and sent 01/11/2002. **P-40 not listed on application.**
Northampton	SPR 12-6-Z 06/25/2001	Crafts Ave Old South St Conz St Fulton Ave	Applied for: 28 Actual: 28 No poles licensed. **FT attached to 31 poles.**	No work performed by MECo. Application cancelled. **4 poles not listed on application.**
Northampton	NHA 9-4-Z 02/14/2002 NHA 12-7-Z 02/14/2002	Dewey Ct South St (Rt 10) Hampton Ave	Applied for: 57 No poles licensed. **FT attached to 1 pole.**	No work performed by MECo. Repeated attempts to contact FT as to their final route status were unsuccessful.

12. Along the route of FiberTech's unauthorized attachments, I observed a complete disregard of licensing agreement requirements. FiberTech's cable attachment methods ignore applicable standards of construction, maintenance, and safety. Their cable crosses over and "boxes in" communications cables of pole owners and authorized pole users. FiberTech violated NESC vertical clearance requirements at almost every pole. FiberTech's installation has physically trapped MECo's capacitor control cables, ground wires, and secondary underground riser wires at various locations. The FiberTech cable weaves itself in, around, under, up and over other communications cables. Most noteworthy, the FiberTech cable does not meet the minimum vertical clearance between communications space cables and low voltage electric secondary cables in the supply space required by the national Electrical Safety Code (NESC). This requirement specifically requires 40 inches vertical clearance between electric supply space cables and communications space cables. Violations of this standard increase the risk of energizing communications cables and creating life-threatening hazards to communications and electric workers working on and around the poles. Furthermore, FiberTech used extension brackets to horizontally out-rig around existing communications and electrical equipment, making a total charade of existing clearance standards. The clearance requirements of the NESC, noted above, do not allow for a reduction of the vertical clearance based on a horizontal offset of attachments.

13. Further, FiberTech has attached without adhering to proper guying requirements. Multiple guying issues were previously identified by MECo and discussed in person and on site with FiberTech personnel. In installing its unauthorized

attachments, Fibertech has addressed none of these concerns. In other locations, it was noted that FiberTech attached pole-to-pole guys that were never applied for.

14. In addition, these subject attachments have gravely compromised existing joint owner's and authorized licensees' ability to access their facilities for maintenance and repairs. In the installation of its cable, FiberTech relocated existing equipment belonging to authorized pole users to make room for its own unauthorized attachments.

15. FiberTech attached to 41 poles that are scheduled for relocation for a Massachusetts Highway Department (MHD) road job on Route 66. The affected poles are P.1 through P.35 on Route 66 and P.1 through P. 6 on Earle Street. The MHD work is presently in progress and the existing poles must be removed before the MHD can perform final paving in this area. MHD is scheduled to begin preliminary paving on September 25, 2002. All other pole users are in the process of preparing to remove their equipment from these poles. FiberTech's attachments will need to be removed prior to the removal of these poles.

16. FiberTech also attached to 7 poles currently scheduled for removal without replacement (MECo's facilities are to be replaced with underground facilities). P.1 through P.7 on Elm Street are scheduled for removal by August 2003. In addition, P.2 and P.3 on West St. have been replaced with new poles in preparation for the new underground scheme. The old existing poles need to be removed as soon as possible; however FiberTech's attachments are preventing MECo from removing these SO poles. It should also be noted that these new poles will be electric primary mainline 13.8 kV cable risers and no other utility will be authorized to attach to these poles.

17. FiberTech attached to a number of old condemned poles identified for replacement due to deterioration. This planned work was explained in detail to FiberTech, but FiberTech ignored MECo directives and attached to these poles.

18. FiberTech was explicitly told, verbally and in correspondence dated January 11, 2002, not to use Poles #40 and #41 on Mount Tom Road in Northampton for its risers (a riser is a transition between underground and overhead construction) to get under Interstate 91. These poles have electric primary mainline 13.8 kV cable risers. MECo directed FiberTech to install its risers at Poles #39 and #42, subject to approval by Verizon. FiberTech ignored this directive and installed its risers on Poles #40 and #41. Pole #40 was never listed on FiberTech's application for attachment.

19. On August 6, 2002 MECo discovered that FiberTech had installed additional equipment on riser poles that FiberTech used for their unauthorized attachments. FiberTech performed such work after being formally notified by Verizon, the joint owner of the poles, to cease all unlicensed work.

20. FiberTech's continuing unauthorized placement of cable and equipment on MECo poles has made it extremely difficult to determine the full extent of FiberTech's unauthorized attachments in the City of Northampton.

21. The haphazard attachment of FiberTech's cable has created countless construction, maintenance, and safety issues for MECo, the joint owners of the poles, and all licensees. These attachments have also made it extremely difficult and impractical for MECo to complete the make-ready work that would be required to accommodate FiberTech's attachments, even if FiberTech were to now pay for such work.

22. Finally, FiberTech has admitted publicly that it installed the unauthorized attachments without obtaining the requisite local approval from the City of Northampton. A true copy of an article appearing in the Daily Hampshire Gazette on August 15, 2002, concerning FiberTech's admitted failure to obtain local approval is attached to this affidavit as Exhibit A.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 16th DAY OF SEPTEMBER, 2002.

Pamela Jo. Fournier

Timeline of Events

March 2000: MECo signed Agreement #1025 with FiberTech.

July 2000: Received first letter, plus nine applications for attachment, from FiberTech.

Sept. 2000: Initial project meeting in Springfield, MA with FiberTech and utilities.

Oct. 2000: Project management meeting in Springfield.

Oct. 2000 – March 2001: Field surveys conducted.

April 2001: FiberTech cancelled all previous applications and changed scope; details to follow.

July 2001: Received three new applications.

Sept. 2001: New surveys started.

Oct. 2001: FiberTech requests re-survey of all poles. MECo declines, preparing make-ready work with existing information.

Dec. 2001: Met with Matt Bradshaw of FiberTech in Northampton. We rode the entire route of application NOR 9-1-21 and SPR 12-4-Z. He stated that at this time all other applications had been cancelled. We discussed guying and riser pole issues.

Jan. 2002: Make-ready estimate sent to FiberTech.

Feb. 2002: Received two new applications for different routes in Northampton.

Mar. – Apr. 2002: FiberTech requests to attach in Supply space; MECo offers proposed conditions for such attachments.

May 2002: Unable to contact FiberTech. No make-ready estimate monies received.

June 2002: FiberTech attaches.

Fiber-optic firm's wiring catches cities off-guard

By DAN CROWLEY, Staff Writer

Thursday, August 15, 2002 -- EASTHAMPTON - A high-tech firm has been using fiber-optic cables it hung along the city's utility lines in June without permission. Now, it is up the City Council to determine whether the lines can stay.

Fibertech Networks of Rochester N.Y. installed a fiber-optic loop through Easthampton and Northampton on June 22 and 23.

Officials in both cities said the firm installed the network while bypassing the local approval process.

The company has since submitted petitions to both cities for permission to locate and maintain its network along each city's utility pole lines.

Mario Rodriguez, director of government affairs and facilities access at Fibertech Networks, said the company's decision to install the loop without local approval was "an honest misunderstanding."

"We usually work through the department of public works and engineering departments," said Rodriguez during a telephone interview Tuesday. "In building the network, some of the cities and towns did not require a grant of location (for the network). We were under the impression we didn't need it."

According to Fibertech officials, the network is designed to enhance the area's telecommunications infrastructure. The company leases space on its network to other companies and government agencies for various telecommunications capabilities, such as telephone or Internet access services, for example.

Easthampton Councilor Joy E. Winnie, a member of the Public Safety Subcommittee, said Tuesday that councilors likely will follow the mayor's lead as it reviews Fibertech's requests.

"Certainly, we are going to look to the mayor on this because we don't want this to happen again," Winnie said. "We do have the option of disconnecting."

"If I had to vote, I would deny them permission," said Mayor Michael A. Tautznik on Tuesday. "I'm not interested in seeing their cables littering the city."

At the same time, Fibertech Networks is under fire from Verizon and Western Massachusetts Electric Co., which have taken legal action against the firm.

Verizon filed an injunction against Fibertech Networks in Hampden Superior Court on Aug. 8 for breach of contract and "to remove its unauthorized attachments and to refrain from making any more unauthorized attachments," said Michael Pequignot, a Verizon spokesman.

Pequignot said the action concerns cables hung in Agawam, Springfield, Northampton and Easthampton.

"It was the one in Easthampton that actually brought this thing to light," said Pequignot, adding that Fibertech Networks needed to obtain a license before hanging its cables because Verizon either owns or co-owns the poles with other utility companies.

Western Massachusetts Electric Co. is seeking to stop Fibertech Networks from further work and to remove its cables because of clearance and safety violations, said Nancy Creed, a WEMCO spokeswoman.

"They've installed things on improper brackets, and they've attached cables on the wrong sides of poles," Creed said, noting that a court hearing was scheduled Wednesday in Hampden Superior Court. "We want to make sure these poles are safe. This (legal action) is a last step measure for us."

Under state law, a company planning to construct lines along, under, or across a public way, must seek approval from local authorities through a hearing process as well.

Fibertech Networks' recently filed paperwork in Easthampton covers the network's cable locations along Route 5, Route 10, downtown and along Route 141, where the loop connects in Holyoke.

The network is one of two that interconnect Hampden and Hampshire counties.

The City Council Public Safety Subcommittee will discuss Fibertech Network's requests at a public meeting in Town Hall Wednesday, Aug. 28 at 6:30 p.m. The subcommittee is expected to make a recommendation to the full council.

Tautznik, who discovered a subcontractor installing the cables on June 23, said Tuesday that the company has been unresponsive to his requests for

information on how the network will benefit the city for public purposes.

"Maybe they're treating Northampton better than Easthampton," Tautznik said. "The company has been nonresponsive to any requests we've had for improvements to the community. It appears as though they're not willing to do much of anything."

Rodriguez said Fibertech is doing everything it can to rectify the problem. "We have responded to every request we have received," said Rodriguez in response to Tautznik's remarks. "We're not trying to duck anybody."

Teri Anderson, Northampton Mayor Clare Higgins' economic development coordinator, said Northampton is still researching the matter. "We're trying to get a handle on how many poles they are attached to and where they are attached to," Anderson said.

"The City Council has to rule on it," she added. "I imagine it will come to the City Council at one of their September meetings."

Rodriguez said the fiber-optic loop will benefit the community by bringing it into the 21st century. He said the company's network was installed within the telecommunications space along the city's utility pole lines and not in the city's municipal space.

"We don't want any controversy," Rodriguez said. "We want to work with the municipality."

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